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QUESTIONS PRESENTED

1. Whether the sixth amendment requires, as part of the integrity of the factfinding process, live, face-to-face confrontation and cross-examination, in the presence of the defendant, the judge, and the factfinder, for all circumstances in which the evidence lacks inherent reliability?

2. Whether an underinclusive statute, not employing the least restrictive alternative, which denies face-to-face confrontation, and which infringes upon the rights to counsel, trial by jury, compulsory process, and fair trial is outweighed by the State's proferred compelling state interests?

3. Whether a nonspecific finding that a child fact witness would suffer severe emotional distress by testifying in a courtroom is sufficient to constitute the requisite individualized finding of trauma, causally connected to testifying in the presence of the defendant?

4. Whether the holding of the Court of Appeals of Maryland, based solely upon the trial judge's failure to personally question and observe the child fact witnesses, as required under state statute, constitutes a plain statement of independent and adequate state grounds?

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STATEMENT OF THE CASE

Sandra Ann Craig was convicted of child abuse, assault, and related charges, based essentially on testimony of Brooke Etze, which was received by the jury via one-way closed-circuit television. Brooke, almost seven years old at the time of trial, claimed that between September 1984 and June 1986 (the entire time period of her attendance at the Craig Country Pre-School), when she was between four and six years old, Mrs. Craig hit her "private parts" with a stick and stuck her with thumbtacks. This testimony was corroborated by the testimony of Justin Peeples, four years old at the time of trial, who claimed that Mrs. Craig put a screwdriver in his anus at some time between March 1985 and February 1986 (the entire time of his attendance at the Craig Country Pre-School), when he was between two and three years old; by the testimony of Jessie Sue Smith, five years old at the time of trial, who claimed that Mrs. Craig put a stick in her anus at some time between January 1985 and April 1985 (the entire time of her attendance at the Craig Country Pres-School), when she was between two and three years old; and by the testimony of Drew Woodbury, five years old at the time of trial, who claimed that between January 1985 and November 1985 (the entire time of his attendance at the Craig Country Pre-School), Mrs. Craig put an unidentified object in his anus when he was between three and four years old. These children were permitted to testify under the "other crimes" exception.[1]

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[1] The children's allegations were made after a six-month intense and highly publicized investigation launched as a result of a report of suspected sexual child abuse based on the comment of a teacher, who worked at another day care facility, to a health department nurse about a child, who had previously attended the Craig County Pre-School. That child allegedly reported to someone else that she had a dream about Pinnochio. The investigation includei sending letters to all parents of all children who had attended the Craig Country Pre-School, outlining the allegations of sexual child abuse. A meeting was held where further information about the allegations was disseminated and parents were urged to have their children "evaluated" at the Howard County Sexual Assault Center. Not surprisingly, the "flood" of allegations then began.

Mary Burke, Brooke's therapist, who was not qualified at trial as an expert, was permitted to tell the jury that Brooke was an abused child, who manifested the symptoms of child abuse, and was permitted to relate Brooke's allegations of abuse by Mrs. Craig. The children's parents were permitted to tell the jury what their children told them about being abused.

Dr. Charles Shubin, a pediatrician, testified that Brooke had one small scar in her vagina consistent with being penetrated by a stick. He was permitted to describe her vagina as being abnormally large. He characterized both the size of her vagina and the scar as "healed sexual injuries." He testified that Jessie Sue had a "severe sexual injury" to her vagina and that her vagina was also abnormally large. He testified that Justin and Drew had small scars in their anuses, which he similarly characterized as "sexual injuries."

For the defense, Dr. Larry Wissow, a pediatrician appointed by the court to examine the children, testified that Brooke's vagina was of a normal size for her age. The defense called Dr. Leopold Walder, a clinical psychologist, for the purpose of rebutting the opinions of Mary Burke that Brooke manifested the behavioral profile of an abused child and that she had been abused. However, the trial judge did not permit Dr. Walder to so testify. Dr. Walder did testify that it was possible for adults to influence children to make false complaints of child abuse.

On rebuttal, the prosecution called Dr. Leon Rosenberg, a clinical psychiatrist, who testified that it was not possible for adults to interact with children in such a way as to cause them to make false complaints of child abuse.[2]

Before trial, the State requested that the children not be required to testify in open court, but rather be allowed to testify out of Mrs. Craig's, the jury's, and the judge's presence, through one-way closed-circuit television, as authorized by section 9-102 of the Maryland Courts and Judicial Proceedings Code Annotated. The trial judge heard testimony from the

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[2] This Court in *Coy* noted the possibility of malevolent or well-intentioned adults coaching children. Social scientists, psychologists, psychiatrists, and attorneys have documented this phenomena of false accusations of child abuse.

children's therapists and concluded, without questioning or observing any of the children, hearing from any other witnesses, or exploring any alternatives, that all of the children should testify at trial via one-way closed-circuit television. To justify the denial of Mrs. Craig's right to face-to-face confrontation, the State called Mary Burke, who was neither offered nor qualified as an expert.

The Court of Appeals of Maryland characterized the testimony regarding the need for the child fact witnesses to testify via one-way closed-circuit television as follows:

> The expert testimony in each case suggested that each child would have some or considerable difficulty in testifying in Craig's presence. For example, as to one child, the expert said what "would cause him the most anxiety would be to testify in front of Mrs. Craig . . . ." The child "wouldn't be able to communicate effectively." As to another, an expert said she "would probably stop talking and she would withdraw and curl up." With respect to two others, the testimony was that one would "become highly agitated, that he may refuse to talk or if he did talk, that he would choose his subject regardless of the questions" while the other would "become extremely timid and unwilling to talk."

Craig v. *State*, 316 Md. 551, 568-69, 560 A.2d 1120, 1128-29 (1989).

The trial judge heard "expert" testimony concerning all eleven child fact witnesses in all indictments then pending.[3]

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[3] Six months later, during the related trial of Mrs. Craig's son, Jennifer Cleveland, one of the children who was a subject of the section 9-102 hearing, was found incompetent to testify, thereby forcing the State to enter a nolle prosequi in the middle of its case. The child could not even recall attending Mrs. Craig's pre-school, did not know who Jamal Craig was, and could not identify him at the time of trial. This child, like the four child fact witnesses who testified in this case, was neither observed nor questioned by the trial judge, on the issue of whether live, face-to-face confrontation with Jamal Craig would render her unable to testify. The judge refused to reopen the section 9-102 hearing for further evidence regarding any increased maturity of the child fact witnesses in that case.

A civil suit, *Jane Doe 1, et al.* v. *Sandra A. Craig et. al.*, in the

The trial judge did not observe or question any of the children. In fact, the judge's first observation of any of the four child fact witnesses in the instant case occurred during the trial on the merits.

At the time of the section 9-102 hearing, there had been no disclosure of the voluminous and detailed materials, which were obtained post trial. The documents concerning the investigation of this and related cases revealed: (1) the type and amount of influences to which each of these children had been subjected; (2) their prior statements accusing others of the abuse Mrs. Craig was charged with committing; and (3) the children's misidentifications of Mrs. Craig on prior occasions.

After the trial, Mrs. Craig discharged her trial counsel and hired present counsel. Mrs. Craig filed a motion for new trial. Before and during the hearing on the motion, counsel obtained, by subpoena, the therapists', psychologists', and psychiatrists' notes of each of the many therapy sessions that they had with the four children in the instant case. Defense counsel also obtained by subpoena the records of the Howard County Health Department, the Howard County Department of Social Services, and the Howard County Sexual Assault Center.

These documents (Motion for New Trial exhibits A thru YY; Court of Appeals Joint Record Extract at E. 1691-1779) (hereinafter MFNT Ex. ___; COA JRE at ___) established that Mary Burke, Brooke Etze's therapist, believed that "fantasy and reality were mixed up for this child" at the time of Brooke's allegations (MFNT Ex. F; COA JRE at E. 1705). Her notes revealed that Brooke told Dr. Shubin that a child named "Mica" caused the injury to her vagina (MFNT Ex. E; COA JRE at E. 1704). Brooke told Ms. Burke that "Jamal" had put his penis in her vagina and hurt her "privates" with his hand. Brooke also

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Circuit Court for Howard County, Case No. 87-CJ-6902, was filed by many of the parents and children against Mrs. Craig and others. Stacey Meyers, one of the plaintiffs, was also one of the child fact witnesses in related criminal cases against Mrs. Craig and Jamal Craig. Stacey, who was eight at the time, was deposed, *by her own lawyers*, over a six-hour period, in the presence of numerous counsel, while sitting in face-to-face close proximity to Mrs. Craig.

said that other children "bit" her in her private parts and that Mrs. Craig had hit her *with a rock, not a stick as she had testified at trial* (MFNT Ex. EE; COA JRE at E. 1732). Mary Burke's notes indicated that Brooke had *misidentified* Zena Craig, who was 17 at the time, as being Mrs. Craig, who was 40, and Jamal Craig, who was 15 at the time, as Michael Craig, who was 42 (MFNT Ex. II & JJ; COA JRE at E. 1746, E. 1747). The notes also revealed that Brooke implicated children named "Stacey" and "Shannon" as perpetrators of the alleged abuse, that she had accused a "black boy" and a "red-haired boy" of injuring her in her "privates," and that a boy named "Chris" bit her in her "privates" (MFNT Ex. D; COA JRE at E. 1702). The records revealed similar information about Jessie Sue Smith, Drew Woodbury, and Justin Peeples (MFNT Ex. C, L, N, Q, R, S, T, U, V, W, Y, AA, BB, CC, DD, HH, PP, & RR; COA JRE at E. 1696, 1712, 1714, 1716, 1717, 1718, 1719, 1722, 1723, 1724, 1726, 1728, 1729, 1730, 1731, 1745, 1753, 1755).

Finally, the records revealed a wealth of information casting doubt on the credibility of the children, their competency to testify, and their supposed inability to testify live face-to-face in a courtroom in the presence of Mrs. Craig, the jury, and the judge. At the hearing on the motion for a new trial, the prosecutor, who was called as a defense witness, testified that she had attended ten to twelve therapy sessions with Brooke Etze, during which much of this exculpatory evidence was revealed (T. 8/11/87, 1a-168 to 1a-169) (COA JRE at E. 529, E. 530). Likewise, the prosecutor attended dozens of other sessions with the other children (T. 8/11/87) (COA JRE at E. 521). Mrs. Craig challenged the withholding of exculpatory evidence in her motion for new trial, which was denied. The Court of Appeals of Maryland granted certiorari on this issue. "However, because of the reversal, we need not address petitioner's contention that she was improperly denied certain exculpatory information to which she was entitled under *Brady* v. *Maryland*, 373 U.S. 83 (1963). She now is in possession of this material and will be able to make appropriate use of it in the event of a new trial." *Craig* v. *State*, 316 Md. 551, 555 n.3, 560 A.2d 1120, 1121-22 n.3 (1989).

During trial, the one-way closed-circuit television procedure was carried out with great difficulty. Mrs. Craig expressed

concern from the outset about her ability to speak with her counsel (J.A. 73-74). She had taught these children, knew them well, and had special knowledge of each child's intellectual and moral capabilities and, therefore, could have greatly assisted her counsel during the competency evaluation and the cross-examination of each child, as well as during the section 9-102 hearing.

The video camera technician was in the judge's chambers along with the prosecutor, defense counsel, and a court clerk (J.A. 89). Mrs. Craig, one additional defense counsel, one additional prosecutor, the judge, and the jury were in the courtroom viewing the image of the child fact witness on two nineteen-inch television monitors. The only image projected through the monitors was that of the child fact witness (J.A. 89). Although the audio portion of the projection included the questioning and comments by the prosecutor and defense counsel, their physical images were not projected.

The only means of communication between Mrs. Craig and her defense counsel, who was in chambers with the child, was by means of an open phone line to the defense table, where Mrs. Craig and second chair defense counsel were seated in the courtroom. Although there was initially some confusion about whether a button needed to be pushed to "open" the phone line (J.A. 86), the line was actually continuously open.

Neither the mechanics of the procedure nor the phone line was tested or practiced with the defendant or defense counsel prior to its use at trial. The phone receiver was laid on the table next to defense counsel, who was seated out of camera view in the judge's chambers. Mrs. Craig, seated in the jury's view in the courtroom, sat with the phone receiver to her ear. Thus, she had to speak loudly enough for defense counsel to hear her through the open receiver laying on the table, while his attention was directed at the child fact witness and the prosecutor. Although a microphone was placed on the desk in front of the chair where each child witness was seated, there was no mechanism to ensure that the child spoke directly into the microphone or maintained an even tone of voice. Mrs. Craig complained of her difficulty in hearing what the child was saying (J.A. 81).

The mechanics also required that the sound plug, but not the video plug, be "pulled" every time anyone registered an objection (J.A. 83). Notwithstanding the making of an objection, the two video monitors would continue to "project" the child's active image to the jury. Counsel in chambers with the child would exit the chambers and then enter the courtroom through a hallway to confer with the judge at the bench, in view of the jury.

During the competency voir dire of Brooke Etze, Mrs. Craig was unable to reach defense counsel on the phone, despite numerous attempts (J.A. 86). The court repeatedly acknowledged the technical difficulties with the phone communication between Mrs. Craig and her counsel, and with the process of coordinating objections and their resolution (J.A. 85-87). The court was also concerned with the continued projection of the child's image on the monitor, which the jury could view while counsel were at the bench. Concerned that the audio was still projecting into the courtroom while objections were being resolved (J.A. 137), the trial judge directed that the technician "should pull a plug or something for the time being" (J.A. 138).

The problem with the phone communication continued throughout the entire direct cross-examination of Brooke Etze (J.A. 139). Only after defense counsel completed cross-examination, and after commencement of the prosecutor's redirect, was Mrs. Craig finally, through the intervention of the judge, able to reach defense counsel in chambers. The judge observed and heard that Mrs. Craig had been frantically trying to reach counsel to insist upon a certain line of cross-examination of Brooke (J.A. 141-59).[4]

Mrs. Craig's motion for new trial was denied on August 25, 1987. When *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), was decided on September 10, 1987, Mrs. Craig renewed her motion for new trial. She argued a failure of all three *Wildermuth* standards: (1) that ordinarily the trial judge

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[4] Counsel of record in this Court was trial counsel in the trial of Jamal Craig, in July 1987, before the same judge, in the same courtroom, with the same prosecutors, in which the same procedure was utilized.

should question and observe the child, in the defendant's presence; (2) that more than expert testimony should be required; and (3) that the evidence should be specifically focused on the impact to the child of testifying in the defendant's presence. The trial court again denied her motion. On September 21, 1987, Mrs. Craig was sentenced to concurrent terms of ten years and noted her appeal. This Court's decision in *Coy* v. *Iowa* was issued on June 29, 1988, after oral argument in the Court of Special Appeals of Maryland. Mrs. Craig filed a motion for reargument in light of *Coy*, which was denied. Her conviction was upheld by the Court of Special Appeals of Maryland on August 3, 1988 (Pet. App. 22a-69a). The Court of Appeals of Maryland granted certiorari. On July 24, 1989, the court unanimously reversed Mrs. Craig's conviction, holding that the requirements of section 9-102 had not been met (Pet. App. 1A).

SUMMARY OF ARGUMENT

The sixth amendment right to face-to-face confrontation with fact witnesses is fundamental. Only upon a showing of inherent reliability and unavailability, such as long-recognized hearsay exceptions, has the Court fashioned an exception to this otherwise absolute right. A child fact witness does not possess such inherent reliability and has historically been required to give live, in-court, face-to-face testimony.

This Court has long recognized the preference for live, in-court testimony by fact witnesses in the presence of the defendant. The integrity of the factfinding process requires that facts, and fact witnesses, be evaluated by a factfinder after exploitation by adversaries. Heretofore, the attorney adversary confronted the witnesses and cross-examined the testimony, and the factfinding process intentionally involved the interplay and dynamics of the entire courtroom—its players and its process.

Social scientists and child abuse experts recognize that child fact witnesses are highly susceptible to pretrial and trial influences. Prior to child protective statutes, child fact witnesses submitted to the same scrutiny as all other witnesses and it

was the role of the factfinder to determine the credibility of the child fact witness as the factfinder would any other witness.

The State argues that there is a compelling state interest that outweighs the defendant's constitutional right to live, in-court testimony, subject to face-to-face confrontation. However, the statute is arbitrary and underinclusive, in that it does not protect all child victims and it does not deny face-to-face confrontation to all adult predators. Moreover, it fails to employ the least restrictive alternative. The extraordinary process of one-way closed-circuit televised testimony also impacts the right to communicate with counsel and the right to have the factfinder determine the credibility of the witnesses.

In *Coy* v. *Iowa*, this Court found that any intrusion into the protected territory of the constitutional right to face-to-face confrontation would require—at a minimum—an individualized finding that a child fact witness needs special protection from testifying in the presence of the defendant. No such determination was made by the trial court in the instant case, and the statute is unconstitutional as applied.

Finally, the Court of Appeals of Maryland relied solely upon statutory construction of a Maryland state statute—independent and adequate state grounds—in deciding this case below. In short, the court found that the trial judge failed to personally question and observe the child fact witness, as required by the Maryland statute.

ARGUMENT

I. THE SIXTH AMENDMENT RIGHT TO FACE-TO-FACE CONFRONTATION, IN ALL CIRCUMSTANCES IN WHICH THE EVIDENCE DOES NOT POSSESS INHERENT RELIABILITY, IS ABSOLUTE, BECAUSE THE INTEGRITY OF THE FACTFINDING PROCESS REQUIRES THAT THE TESTIMONY OF FACT WITNESSES, PARTICULARLY CHILD WITNESSES HIGHLY SUSCEPTIBLE TO INFLUENCE, BE SUBJECTED TO LIVE, FACE-TO-FACE CONFRONTATION, IN A FORMAL COURTROOM SETTING, IN THE PRESENCE OF THE DEFENDANT, THE JUDGE, AND THE FACTFINDER.

In *Coy* v. *Iowa*, 487 U.S. 1012, 108 S.Ct. 2798, 2803 (1988), this Court left open the issue of whether the sixth amendment right to confrontation is absolute.

A. The Only Exceptions To The Right To Confrontation That Have Been Permitted By This Court Are Those Long-Recognized Exceptions To The Rule Against Hearsay, Affording The Inherent Reliability Necessary To Satisfy The Goal Of The Sixth Amendment.

Confrontation is the "greatest legal engine ever invented for the discovery of truth." *Kentucky* v. *Stincer*, 482 U.S. 730, 736 (1987). Although this Court has never had occasion to determine whether the right to "face-to-face" confrontation is absolute, the Court has addressed the issue of what, if any, limitations the sixth amendment places upon the use of hearsay. This Court has held that the right to confrontation is violated by the use of hearsay unless the defendant is unavailable and the testimony is reliable. *Ohio* v. *Roberts*, 448 U.S. 56, 65-67 (1980). The reliability must rise to the same level of trustworthiness that would accompany the testimony if it were fully subjected to the exercise of the right to confrontation. *Id.* at 65. Accordingly, this Court has held that exceptions to the rule against hearsay satisfy the right to confrontation only when they are "firmly . . . rooted in our jurisprudence." *Bourjaily* v. *United States*, 483 U.S. 171, 183 (1987).

The Court has employed language, which when read in isolation, appears to offer "exceptions" or "limitations" on the right to confrontation. However, this has only been applied to testimony that comes within these long-recognized "inherent reliability" exceptions, which need no confrontation to satisfy the sixth amendment's goal. For all other testimony, nothing less than an absolute right to live, in-court, face-to-face confrontation and cross-examination, in the presence of the defendant, is sufficient to satisfy the right to confrontation.

In *Ohio* v. *Roberts*, 448 U.S. 56 (1980), Justice Blackmun stated:

> [T]he absence of proper confrontation at trial "calls into question the ultimate 'integrity of the fact-finding process.'"
>
> The Court, however, has recognized that competing interests, if "closely examined," may warrant dispensing with confrontation at trial. . . .
>
> . . .

> [I]n conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes a rule of necessity. . . .
>
> Reflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that "there is no material departure from the reason of the general rule.". . .
>
> The Court has applied this "indicia of reliability" requirement principally by concluding that certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with the "substance of the constitutional protection.". . .
>
> Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. *In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.*

Id. at 64-66 (emphasis added) (citations and footnotes omitted). In *California* v. *Green*, 399 U.S. 149 (1970), Justice White, discussing the rationale behind the sixth amendment, stated:

> [T]he particular vice that gave impetus to the confrontation claim was the practice of . . . denying the defendant the opportunity to challenge his accuser in a face-to-face encounter in front of the trier of fact. . . .
>
> . . .
>
> Our own decisions seem to have recognized at an early date that it is this literal right to "confront" the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause:
>
> "The primary object of the constitutional provision in question was . . . an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

Id. at 156-58.

Thus, confrontation is absolute unless there is a showing of the same degree of trustworthiness that the process envisioned by the confrontation clause was designed to produce.

Neither *Coy* nor the instant case present a firmly rooted exception to the rule against hearsay. The reason that the State denies face-to-face confrontation is not because of the inherent reliability of the testimony of the child fact witness but rather because of the proffered interest "in ensuring that the children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence." Petitioner's Brief at 24. Thus, the testimony of the child fact witness in both *Coy* and the instant case comes within the vast majority of fact witness testimony, lacking in inherent reliability and therefore subject to the process mandated by the confrontation clause for examining credibility.

This Court has never ruled that the right to face-to-face confrontation is less than absolute, and the language that the Court has used in prior decisions indicates that it would not so rule. In *Coy*, Justice Scalia, writing for the Court, stated:

> [T]he right "to be confronted with the witnesses against him . . . comes to us on faded parchment," with a lineage that traces back to the beginnings of Western legal culture. . . .
>
> Most of this Court's encounters with the Confrontation Clause have involved [exceptions to the rule against hearsay]. The reason for that is . . . that there is at least some room for doubt (and hence litigation) as to the extent to which the Clause includes those elements, whereas, . . . "[s]imply as a matter of English" *it confers at least "a right to meet face to face all those who appear and give evidence at trial."*. . .
>
> *We have never doubted, therefore, that the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact* . . . . [The clause is] intended "to secure the accused the right to be tried . . . by only such witnesses as meet him face to face at the trial, who give their testimony in his presence . . . [W]e have described the "literal right to 'confront' the witness at the time of trial" as forming "the core of the values furthered by the Confrontation Clause.". . .
>
> *[T]here is something deep in human nature that regards face-to-face confrontation between accused and accuser as "essential to a fair trial in a criminal prosecution."*. . .
>
> A witness "may feel quite differently when he has to repeat his story looking at the man whom he will harm greatly by distorting or mistaking the facts . . . . It is always more difficult to tell a lie about a person "to his face" than "behind his back." In the former context, even if the lie is told, it will often be told less convincingly.". . .
>
> . . .
>
> It is true that we have in the past indicated that rights conferred by the Confrontation Clause are not absolute, and may give way to other important interests. The rights referred to in those cases, however, were not the right narrowly and explicitly set forth in the Clause . . . the irreducible literal meaning of the clause: "a right to *meet face to face* all those who appear and give evidence *at trial*."

Coy, 487 U.S. at ____, 108 S.Ct. at 2800-03 (citations omitted) (most emphasis added; some emphasis in *Coy*).

Concurring in *Coy*, Justice O'Connor took the position that rights under the confrontation clause are not absolute. However, even the statement that "our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses[,]" *id.* at ____, 108 S. Ct. at 2805, is based upon the fact that "the Court has time and again stated that the Clause 'reflects a *preference* for face-to-face confrontation at trial,' and expressly recognized that this preference may be overcome in a particular case if close examination of 'competing interests' so warrants." *Id.* at ____, 108 S. Ct. at 2804 (citations omitted) (emphasis in *Coy*). However, in all of this Court's prior holdings on which Justice O'Connor relies, the "competing interests" were the need for relevant and material evidence for which live testimony was unavailable and the evidence possessed the inherent reliability found within, and demanded by, a firmly rooted hearsay exception.

B. The Integrity Of The Factfinding Process Requires Face-To-Face Confrontation, Because Requiring An Accuser To State The Accusation In The Live Presence Of The Accused Profoundly Impacts Upon The Search For Truth.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), the Court contrasted the prophylactic nature of fourth amendment protections with:

> those rights guaranteed to a criminal defendant to insure that he will be accorded the greatest possible opportunity to utilize every facet of the constitutional model of a fair criminal trial. Any trial conducted in derogation of that model leaves open the possibility that the trial reached an unfair result precisely because all the protections specified in the Constitution were not provided.

Id. at 241. The integrity of the factfinding process is the adversary system's ultimate "quality control" mechanism. When the system possesses the requisite integrity in its guilt-innocence determination process, it enjoys the highest possible assurance of both "the accuracy of the factfinding" and the elimination of "the clear danger of convicting the innocent." *Brown* v. *Louisiana*, 447 U.S. 323, 329 n.6 (1980).

This Court has recognized that certain aspects of the fifth, sixth, and fourteenth amendments were designed by the framers to ensure the integrity of the factfinding process. *E.g.*, *Taylor* v. *Illinois*, 484 U.S. 400 (1988) (right to compulsory process); *Vasquez* v. *Hillery*, 474 U.S. 254, 260-64 (1986) (cannot be indicted by a grand jury not composed of a fair cross-section); *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (right to trial by jury not satisfied by a nonunanimous, six-person jury verdict); *Kaufman* v. *United States*, 394 U.S. 217, 224 (1969) (privilege against compelled self-incrimination); *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965) (retroactive application of a right that goes to the integrity of the factfinding process); *Turner* v. *Louisiana*, 379 U.S. 466, 471-72 (1965) (right to an impartial jury); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) (right to counsel).

No component of the adjudicatory process has received a greater endorsement from this Court, concerning its contribution to this integrity, than the right to confrontation. *E.g.*, *Kentucky* v. *Stincer*, 482 U.S. 730, 737 (1987) ("a 'functional' right designed to promote reliability in the truth-finding functions of a criminal trial"); *Ohio* v. *Roberts*, 448 U.S. 56, 64 (1980) ("means of testing accuracy are so important that the absence of proper confrontation at trial 'calls into question the ultimate 'integrity of the fact-finding process.'"); *Pointer* v. *Texas*, 380 U.S. 400, 405 (1965) ("[E]ssential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.").

Whenever there is conflicting testimony, the factfinding process turns upon the credibility of the fact witnesses. Face-to-face confrontation is the only constitutionally approved method for evaluating fact witnesses as to their veracity, truthfulness, credibility, and integrity. As this Court has recognized, there is a profound effect upon a witness standing in the presence of the person accused by that witness. *Coy* v. *Iowa*, 108 S. Ct. at 2802. The factfinder's decision to believe or disbelieve a fact witness is based upon the sum of the (1) content of the testimony, (2) overall demeanor of the witness, (3) reaction of the defendant to the witness, (4) reaction of the witness to the defendant, (5) interplay between the questioning attorney and the witness, and (6) the interplay, if any, between the judge and the witness, e.g., a question or an admonition from the judge to the witness.

1. The Integrity Of The Factfinding Process Requires Face-To-Face Confrontation To The Same Degree, Not Less, When The Fact Witness Is A Child Witness, Who Is Highly Susceptible To Pretrial And Trial Influences.

The integrity of the factfinding process requires face-to-face confrontation to the same degree, not less, in a case in which the fact witness is highly susceptible to pretrial influences. In a child abuse case, pretrial influences are visited upon the suspected child abuse victim by (1) examining and treating physicians who must report suspected child abuse, (2) investigating law enforcement officers engaged in the often competitive business of ferreting out crime, (3) social workers concerned with the welfare of suspected child abuse victims, (4) parents, family, and friends supportive of suspected child abuse victims, (5) treating child psychotherapists and licensed social workers, (6) prosecutors and victim/witness assistance personnel preparing fact witnesses for trial, and (7) malevolent adults. A number of social scientists, psychologists, psychiatrists, and attorneys have recorded these various phenomena in scientific studies and other literature in the study of child abuse.

Social scientists have determined a number of situations in which false disclosures of child abuse occur.[5] Studies demonstrate the importance of avoiding suggestion to impressionable children. Terr, *The Child Psychiatrist and the Child Witness: Traveling Companions by Necessity, if Not by Design*, 25 J. Am. Acad. Child Psych. 462 (1986). "Leading questions . . . distort the stories that children eventually tell." *Id.* at 469.[6]

Much has also been written about the use of so-called "anatomically correct dolls" by social workers. *See, e.g.*, Herzog, *Child Sexual Abuse Defense: Pretrial Investigation, Experts, and Proxy Testimony* (pts. 1, 2 & 3), The Champion, Nov. 1986, at 6, The Champion, Dec. 1986, at 9, The Champion, Jan.-Feb. 1987, at 10, 11-12; McIver, Wakefield & Underwager, *Behavior*

[5] These include: (1) medical problems that give rise to increased sexual concerns or misdiagnosed physical findings, e.g., nonspecific vulvovaginitis, anal fissures caused by constipation, skin lesions misdiagnosed as herpes; (2) a child "brainwashed" by a vindictive parent, usually the mother, who fabricates incest to punish the spouse by excluding him from further contact with the child; (3) a child influenced by a delusional mother who projects her own unconscious sexual fantasies onto the spouse; (4) a child whose allegations of sexual abuse are based upon sexual fantasies rather than reality; (5) a child falsely accusing the father of incest for revenge or retaliation; (6) false allegations of sexual abuse initiated by third parties, e.g., hypervigilant parents of preschool children who have been oversensitized by sensational media coverage of sexual abuse scandals at nursery schools and day care centers; and (7) false testimony of children in preschool and day care settings, e.g., the Jordan, Minnesota case. D. Schetky & A. Green, *Child Sexual Abuse: A Handbook for Health Care and Legal Professionals* 104-23 (1988).

[6] The author describes the "flamingly suggestive" letter sent by a police department to the parents of children who had attended a day care center. The letter described an on-going criminal investigation with a named suspect under arrest, as well as acts of oral sex possibly committed under the pretense of taking the child's temperature, plus nude photography. The letter sought information about whether the recipient's children had ever observed the accused leaving a classroom alone with a child during any nap period or tying up a child. *Id.* at 466.

of Abused and Non-Abused Children in Interviews with Anatomically Correct Dolls, 1 Issues in Child Abuse Accusations 39 (1989). Many child abuse experts argue that the dolls are not anatomically correct, and are more appropriately labelled "anatomically *incorrect*." *See* Herzog (pt. 2), *supra* at 13; *see also id.* (pt. 3), text accompanying no[illegible]s 76-82. Dolls can taint the child's ability to recall events ac[illegible]rately. "The use of the dolls can provide a modeling effect. The social learning literature shows that one of the most powerful ways of teaching children is modeling." Underwager & Wakefield, *Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist*, The Champion, Jan.-Feb. 1987, at 17. Like police officers, "trained behavioral scientists may themselves slip into the suggestive mode." Terr, *supra* at 469.

For emotional reasons, many children are unable to challenge the perceptions of events by parents and other adult caretakers, even when such perceptions are incorrect and differ from that of the child.

> Young children are taught to believe their parents and regard them as authority figures. Given the young child's emotional and physical dependency on her parents and wish to please them, it may be exceedingly difficult for her to challenge her parents' perception of events when they differ from her own.

Schetky & Green, *supra* at 175.

Treating child psychotherapists are not in agreement about the best method of eliciting evidence from sexual abuse victims. A professor of clinical psychiatry has queried whether closed-circuit television is "worth all this fuss." Terr, *supra* at 469. "It will, perhaps, lull courts into thinking that sexually abused children will automatically tell the truth on television . . . ." Dr. Terr believes that in certain instances it is helpful for the child to "stand up" in court and "take societally approved revenge on the person who harmed him." *Id.*

One of the most notorious cases of hysterical reaction to allegations of child abuse occurred in Jordan, Minnesota.

> [A]llegations arose regarding crimes committed against children, ranging from gross sexual abuse to murder. Twenty-four people were accused: one pled guilty, two

were acquitted, and the charges were dismissed against twenty-one others. . . .

The investigation of the allegations was then picked up by the Minnesota Bureau of Criminal Apprehension and the Federal Bureau of Investigation, acting jointly. On February 12, 1985, the Minnesota Attorney General's Office issued "The Report on Scott County Investigations," which detailed the results of this joint investigation. The Report serves as a tragic example of the manner in which an investigation of child sexual abuse can go awry. . . .

The Report found that no credible evidence existed for the multifarious allegations lodged against the residents of Jordan [Minnesota]. . . .

The Report made specific findings regarding the use of repetitive questioning techniques, recognizing that repeated interviews seriously undermined the reliability of any subsequent testimony. One child was interviewed nine times before the joint investigation began; another child endured at least thirty interviews in the course of the original investigation. The Report also cited examples of separating children, who steadfastly refused to admit that any abuse took place, from their parents for several months. These children were repeatedly interrogated by their foster parents about the alleged abuse. There were even examples where the children were told that their reunion with their parents would be fostered by "admissions" of their parents' abuse. The Report found that there was a permeating lack of recording or documentation of the interviews. The Report recognized that recording is necessary to determine the consistency of the child's statements. The Report also condemned the "cross-germination" effect that occurred when the authorities informed interviewees of allegations made by others and conducted joint interviews.

The Report concluded that no evidence existed for the majority of the accusations and that the careless manner of the investigation not only ruined the prospects for the successful prosecution of any valid cases, but may have "created" invalid cases as well.

Feher, *The Alleged Molestation Victim, The Rules of Evidence, and the Constitution: Should Children Really Be Seen and Not Heard?*, 14 Am. J. Crim. L. 227, 239-40 (1987) (footnotes omitted).

Pretrial influence in a child abuse case naturally runs from the adult to the child. The child's relative immaturity, inexperience, and inability to articulate fine distinctions of fact may confound the search for truth and confuse fact from fiction. Courts have long recognized that a child's power to recollect can be lost through an interviewing process that is repetitive and suggestive. In *People* v. *Delaney*, 52 Cal. App. 765, 199 P. 896 (1921), the court stated:

> The force of suggestion, always strong, is particularly potent with the impressionable and plastic mind of childhood. . . . But without intending any such result, the repetition of supposed facts in the presence of a child often creates a mental impression or conception that has no objective reality in any actually existing fact.

Id. at 774, 199 P. at 900.

This is consonant with the understanding of experts of the process of memory. Studies of children's memories suggest that new information accrued from conversation, questions, or other sources "can do more than simply supplement in recollection: it can occasionally alter, or transform, a recollection." Loftus & Davies, *Distortions in the Memory of Children*, 40 J. Soc. Issues 51 (1984). Such distortion is especially likely to occur when "the witness has high regard for the examiner or wants to please her." Landsman, *Reforming Adversary Procedure: A Proposal Concerning the Psychology of Memory and the Testimony of Disinterested Witnesses*, 45 U. Pitt. L. Rev. 547, 553 (1984).

The suggestibility inherent in the individual and collective dynamics of communication with physicians, police officers, social workers, parents, psychotherapists, prosecutors, and malevolent adults, needs face-to-face confrontation and cross-examination in the adversary process. Most, or all, of these pretrial encounters are not preserved for review by the fact-finder. Because an alleged child abuse victim has been exposed to more pretrial influences than an adult fact witness, and because of age and immaturity, there is at least as great a need for the full complement of the sixth amendment right to confrontation.

By contrast, the Maryland statute, instead of subjecting the testimony of the child fact witness to equal scrutiny, permits a

diluted testing. Under the statute, the adversary process itself is designed to replicate the child's initial encounters and interviews—intentionally nurturing and nonthreatening. The child fact witness never encounters a judge, jury, courtroom, or the accused. As such, the factfinding process possesses some of the same indicia of unreliability as the unsworn, out-of-court, pretrial responses to the well-intended, but typically leading, interviews.

2. The Integrity Of The Factfinding Process Requires That Live Testimony Be Received In The Presence Of The Factfinder And The Judge In A Formal Courtroom Setting.

The testimony of a fact witness must also be taken in the live presence of a judicial officer and the formality of a courtroom. The dignity of judicial proceedings requires that the "umpire of the contest" be present for all portions and all aspects. *State* v. *McIver*, 238 S.C. 401, 405, 120 S.E.2d 393, 397 (1961). "This direction and control must continue during the entire trial, and pervade every part . . . ." *Bateson* v. *State*, 46 Tex. Crim. 34, 42, 80 S.W. 88, 91 (1904), *rev'd on other grounds sub. nom. Clark* v. *State*, 56 Tex. 293, 120 S.W. 179 (1909). This requires the judge to be present in person, *Ridenour* v. *State*, 94 Okla. Crim. 92, 102, 231 P.2d 395, 405 (1951), and to be able to see everything that transpires during the judicial proceeding. *Bateson*, 45 Tex. Crim. at 44, 80 S.W. at 92. It is not enough that the judge hears. *People* v. *Chrfrikas*, 295 Ill. 222, 228, 129 N.E. 73, 75 (1920). The judge must "be visibly present every moment of [all criminal trials], so that [the judge] can always see and hear all that is being done. . . ." *Thomas* v. *State*, 150 Ala. 31, 47, 43 So. 371, 377 (1907). Otherwise, the judge will not be able to see facial expressions and cannot "check the abuses . . . and to interpose and restrain counsel. . . ." *Ridenour*, 94 Okla. Crim. at 103, 231 P.2d at 406; *see Bateson*, 46 Tex. Crim. at 40, 80 S.W. at 89 ("no opportunity afforded defendant by his counsel to have it stopped").

Additionally, the process requires the witness to face the factfinder, and the factfinder to evaluate, as a whole, all that transpires, employing simultaneously the senses of sight and

sound. The confrontation clause includes the right "of compelling [the witness] to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." *Kentucky* v. *Stincer*, 482 U.S. 730, 736-37 (1987). The Court in *Stincer* noted that an additional advantage of the confrontation clause is that "the judge and the jury are enabled to obtain the elusive and incommunicable evidence of a witness' deportment while testifying." *Id.* at 737 n.8. Testing the credibility of a witness entails not just observation of facial expressions, it includes observation of the body movement of the witness, which requires the physical presence of the witness before the factfinder. *Lewison* v. *Crews*, 28 A.D.2d 111, 113, 282 N.Y.S.2d 83, 85-86 (1967). Moreover, the factfinder, like the judge, needs to be able to "watch the facial expressions of the attorneys asking questions, . . ." *Eckstein* v. *Kirby*, 452 F. Supp. 1235, 1242 (E.D. Ark. 1978).

Not only are child fact witnesses particularly susceptible to influence during the pretrial period, they are also highly susceptible to influence during the trial itself. The nod of approval or look of consternation from the prosecutor can easily influence the testimony of a child witness. Child fact witnesses should testify in both the immediate presence of a judicial referee and the immediate presence of the factfinder, and the testimony of the child witness should stand the same degree of scrutiny as the testimony of all other witnesses.

The one-way closed-circuit television procedure in the Maryland statute is designed to shield the child fact witness from the accused. Whatever its design, the procedure removes the child fact witness from the formality of the court proceeding, and the child appears before neither a judicial referee nor the factfinder.

In addition, the medium of television itself raises questions "concerning the child's demeanor when the camera, with its obvious limitation, becomes the juror's eyes and ears." Ritsema, *Testimony of Children via Closed Circuit Television in Indiana: Face (to Television) to Face Confrontation*, 23 Valparaiso U.L. Rev. 455, 463 (1989). As Justice Cardoza stated in *Snyder* v. *Massachusetts*, 291 U.S. 97 (1934): "It is common

knowledge that a camera can be so placed, and lights and shadows so adjusted, as to give a distorted picture of reality." *Id.* at 115. Moreover,

> the lens or camera angle may make the witness look small and weak or large and strong, or the camera may fail to carry the subtle nuances of the witness, including changes in the child's demeanor. The child's credibility may also be subconsciously enhanced by the television as often the media gives an aura of credibility and authority to those it portrays.

23 Valparaiso U.L. Rev. at 418. The television procedure thus precludes the finders of fact from seeing all that they could see and should see in an ordinary courtroom setting. "Television justice," in which the child fact witness testifies in a vacuum, via a medium most closely associated in a child's mind with wonder, fantasy, magic and "make believe," cannot help but affect the integrity of the child's testimony.

There is no empirical data, history, or constitutional analysis for the factfinding process employed under the Maryland statute. It is left for this Court's speculation as to the extent of difference for the factfinder between the telegraphic image of the witness over a closed-circuit television system and the live, face-to-face presence of the witness under the system utilized since our adversary process began. What is known is that a judicial officer cannot protect the factfinding process from intended and unintended influence by prosecutors and defense attorneys and the factfinder cannot observe the demeanor of the witness, nor the interplay between the attorneys and witnesses. The integrity of the fact finding process in a child abuse case demands the same face-to-face confrontation as any other criminal adjudication.

C. The Right To Face-To-Face Confrontation Is Absolute Because, Like The Right To "Conflict-Free" Counsel, It Is What Does Not Take Place In Its Absence That Destroys The Integrity Of The Factfinding Process.

The role of counsel in a criminal case is "to ensure that the adversarial process works to produce a just result . . ." *Burger v. Kemp*, 483 U.S. 776, 788 (1987). Thus, like the right to face-to-face confrontation, the right to counsel is one of those

aspects of the adjudicatory process that is integral to the integrity of the factfinding process.

In *Holloway v. Arkansas*, 435 U.S. 475 (1978), because of a conflict arising from multiple representation, three co-defendants moved for appointment of separate counsel, which was denied. In finding a denial of the sixth amendment right to "conflict-free" counsel, this Court recognized that "in a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing." *Id.* at 90 (emphasis in original). "Because the conflict primarily compels the lawyer *not* to pursue certain arguments or take certain actions, it is all the more difficult to discern its effect." *Burger v. Kemp*, 483 U.S. 776, 800 (1987) (Blackmun, J., dissenting).

Even if the right is not otherwise absolute, the Court should determine that the right is absolute when considering (1) the near-absolute, fundamental nature of the right, (2) the harm that comes not from what is done but from what is not done, i.e., the absence of face-to-face confrontation as a truth tester, and (3) the fact that it is almost impossible to discern errors that result from omissions, as opposed to commission.

Further analogy can be seen in this Court's discussion in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). In resolving the waiver standard under the fourth amendment, the Court noted:

> There is a vast difference between those rights that protect a fair criminal trial . . . than the rights guaranteed under the Fourth Amendment. A prime example is the right to counsel. For without that right, a wholly innocent accused faces the real and substantial danger that simply because of his lack of legal expertise he may be convicted. . . . [W]ith everything to be gained by the presence of counsel and no interest deserving consideration to be lost, an inflexible rule serves well.

Id. at 241, 242-43 n.30. This Court should recognize the need for, and adopt, an inflexible rule of right to face-to-face confrontation in all situations not coming within a long-recognized exception to the rule against hearsay.

II. EVEN IF THE RIGHT TO FACE-TO-FACE CONFRONTATION IS NOT ABSOLUTE, THE MARYLAND STATUTE IS UNCONSTITUTIONAL, BECAUSE EITHER THE STATE LACKS A COMPELLING STATE INTEREST IN TELEVISED TESTIMONY, TAKEN OUTSIDE OF THE COURTROOM, AND NOT IN THE LIVE PRESENCE OF THE DEFENDANT, THE FACTFINDER, AND THE JUDGE, OR THE DEFENDANT'S RIGHT TO FACE-TO-FACE CONFRONTATION OUTWEIGHS SUCH INTEREST, PARTICULARLY WHEN CONSIDERING THE STATUTE'S UNCONSTITUTIONAL IMPACT ON THE SIXTH AMENDMENT RIGHTS TO COUNSEL AND TRIAL BY JURY.

The State's efforts in protecting child victims and prosecuting adult predators is commendable. However, the legislature, in responding to this emotional touchstone, enacted an underinclusive and arbitrary legislative classification, verifying the State's lack of a compelling interest in its legislative formulation. Even if there is a compelling interest in the statute, this interest cannot outweigh the fundamental right to face-to-face confrontation necessary to ensure the integrity of the factfinding process. This is particularly true in light of the numerous alternatives, each less intrusive upon the fundamental right to face-to-face confrontation, which the State could have employed to serve its interest. Moreover, the balancing process must take into account that the denial of face-to-face confrontation, in turn, unconstitutionally impacts the defendant's sixth amendment rights to counsel and trial by jury.

A. Maryland's Statutory Scheme Is So Underinclusive And Arbitrary In Its Scope That The State Has Either Failed To Demonstrate A Compelling Interest Or Has Enacted Legislation Incapable Of Satisfying Its Interests.

In order to enact a constitutional statute that negatively impacts, infringes upon, or distributes unequally the right to confrontation, there must exist a compelling state interest in the legislative classification. *See Coy* v. *Iowa*, 487 U.S. 1012, ____, 108 S.Ct. 2798, 2805 (1988) (O'Connor, J., concurring); *see generally* L. Tribe, *American Constitutional Law* § 16-7 (2d ed. 1988). The State proffers two compelling state interests. The first is "ensuring that children be shielded from the further

torment associated with testifying in an open courtroom in the defendant's presence." Petitioner's Brief at 24.

The State certainly has a compelling interest in protecting all child victims of crimes of violence and crimes of sexual abuse. Moreover, the State's interest in protecting child victims is an interest that it has on behalf of all child victims of crimes of violence and crimes of sexual abuse, regardless of whether these crimes are perpetrated by a guardian or nonguardian of the victim.

Nevertheless, the legislature enacted section 9-102 to apply only to a limited group of victims, defendants, and offenses. The victim must be a minor child under 18 years of age. Md. Ann. Code art. 27, § 35A (1987). The defendant must be a parent or other person who has permanent or temporary care or custody or responsibility for the supervision of the minor child. *Id.*; Md. Fam. Law Code Ann. § 5-701 (Supp. 1989); *see Pope* v. *State*, 284 Md. 309, 396 A.2d 1054 (1979) (a person in loco parentis). The offense must be child abuse, which in its sexual abuse formulation includes incest, rape, sexual offense, sodomy, and unnatural and perverted sexual practice. *See Wildermuth* v. *State*, 310 Md. 496, 526-27, 530 A. Md. 275, 290-91 (1987).

Thus, the statute only applies for victims of physical abuse or sexual abuse who happen to be part of a parental or in loco parentis relationship with their adult predator at the time of the crime. Because of the limited scope of the statute, other child victims, even though subjected to the identical acts of violence and acts of sexual abuse, do not come within the statute if, at the time of the offense, their assailants are nonguardians. There cannot reasonably exist a compelling governmental interest in shielding child victims of crimes perpetrated by guardians, while "subjecting to further torment" child victims of crimes perpetrated by nonguardians.

In fact, the legislature has provided the protection of section 9-102 to child victims of less severe crimes, while completely denying such protection to child victims of more severe crimes. Maryland deems the nonguardian criminality more culpable, as evidenced by the higher penalties provided for crimes of violence and crimes of sexual abuse when committed by non-

guardians. Physical injury to a child victim by a nonguardian can result in a penalty of at least twenty years imprisonment, and possibly life imprisonment. *Roberts* v. *Warden*, 242 Md. 459, 219 A.2d 254 (1965), *cert. denied*, 385 U.S. 876 (1966). However, physical injury to a child victim by a guardian results in a maximum penalty of only fifteen years. Md. Ann. Code art. 27, § 35A (1987). Similarly, sexual abuse of a child victim by a nonguardian can result in a penalty of twenty years imprisonment, if unaggravated, and life imprisonment, if aggravated. *Id.* §§ 461-464A. However, sexual abuse of a child victim, whether aggravated or unaggravated, by a guardian results in a maximum penalty of only fifteen years. *Id.* § 35A.

This Court has held that a legislative classification may become unconstitutional through its underinclusiveness. In *O'Brien* v. *Skinner*, 414 U.S. 524 (1974), the Court found "wholly arbitrary" a statute under which "those held in jail awaiting trial in a county other than their residence are . . . permitted to register by mail and vote by absentee ballot. Yet, persons confined for the same reason in the county of their residence are completely denied the ballot." *Id.* at 530.

If such underinclusiveness is sufficient to render a statute unconstitutional, it is certainly sufficient to at least preclude the State from demonstrating that it has a compelling governmental interest in such underinclusiveness. If the State's interest in "ensuring that children be shielded from the further torment associated with testifying in an open courtroom in the defendant's presence" were truly compelling, the State would surely have provided the same protection for the child victims of the same acts when committed by nonguardian predators that it does when the acts are committed by guardian predators.

The State's second proffered compelling interest is that of "seeing that those who prey upon children are brought to justice." Petitioner's Brief at 24. The framers certainly believed that the people, through their government, have a compelling interest in a system of criminal justice. As integral parts of this system, the framers recognized search and arrest in the fourth amendment, criminal prosecution in the sixth amendment, and punishment of crime in the eighth amend-

ment. The framers also recognized a compelling governmental interest in a fundamentally fair system of criminal justice. As integral parts of this fairness, the framers mandated that those accused of crime not be subjected to (1) unreasonable search and arrest, U.S. Const. amend. IV, (2) unfair prosecution, *id.* amend. VI, or (3) cruel and unusual punishment. *Id.* amend. VIII.

The Maryland statute affects the constitutional guarantee of right to confrontation by providing less face-to-face confrontation for guardians accused of crimes of violence and crimes of sexual abuse than it does for nonguardians accused of crimes of violence and crimes of sexual abuse. "[N]othing opens the door to arbitrary action so effectively as to allow . . . officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112-13 (1949).

By analogy, child abuse is a crime that is foremost in the public concern, and the legislature has naturally responded. However, the child victim of an act of violence or an act of sexual abuse is no less harmed by the heinous conduct, and the child victim is no less tormented by having to testify, when the crime is committed by someone who is not, at that moment, within the guardian status necessary for the child abuse statute. Nonetheless, the legislature, in its response to this politically sensitive issue, protected one group of child victims, while totally ignoring the same issue for similarly situated child victims. The net effect has been to produce legislation that denies the right to face-to-face confrontation to some defendants, while affording that fundamental right to others. *See Smith* v. *Cahoon*, 283 U.S. 553, 567 (1931) ("not . . . the slightest justification" for an agricultural exemption from a statute "designed to safeguard the public with respect to the use of the highways"). Because the statute affords differing degrees of constitutional protection, there cannot reasonably exist a compelling governmental interest.

B. Even If The State Has A Compelling Interest, The Defendant's Right To Face-To-Face Confrontation Outweighs Such Interest, Particularly When Considering Both The Near-Absolute Nature Of The Right And The Statute's Failure To Employ The Least Restrictive Alternative.

If the Constitution did not require a balancing of the State's interest and the rights of defendants, then all child abuse victims could be shielded from further torment, whatever its source, and all those who prey upon children could be brought to justice, whatever its price. However, the framers of the Constitution expressly provided rights, privileges, and protections for those accused of crime. Moreover, in establishing our unique form of government, the framers themselves accomplished the balancing that is needed, if any. The framers weighed the competing interests of the accused and society and, in response, established the constitutional balance we enjoy in the form of the Bill of Rights. Then, as now, the world was not a world of only truthful accusation. In response to this reality, the framers created the sixth amendment right to face-to-face confrontation as the only permissible method of balancing the rights of the accused and the accuser.

The purpose of live, face-to-face confrontation in the presence of a judge, factfinder, and the accused is to test the truth of the accusation. This process of live, face-to-face confrontation in the courtroom is the history lesson of centuries, which has consistently been recognized by this Court. The State's method of televised, out-of-court testimony in the absence of the judge, the factfinder, and the accused is untested; it is without precedent; it is outside of our common jurisprudential experience. This Court has no reason to believe that its product is truth.

Even if the State could prevail "on balance," when weighing a compelling interest against the least restrictive imposition on the defendant's right to face-to-face confrontation, the State cannot prevail "on balance" when its approach is far shy of employing the least restrictive alternative, particularly when lesser restrictive alternatives could easily have been accomplished.

Last term, in *Sable Communications of California, Inc.* v. *FCC*, 109 S.Ct. 2829 (1989), Justice White, writing for a unanimous Court, stated that the government could regulate the exercise of a fundamental right "in order to promote a compelling interest if it chooses the least restrictive means to further the articulated interest." *Id.* at 2836. Even though the Court found a compelling interest, the government's position could not prevail, because "to withstand constitutional scrutiny, 'it must do so by narrowly drawn regulations designed to serve those interests without unnecessarily interfering with [fundamental rights].' . . . It is not enough to show that the government's ends are compelling; the means must be carefully tailored to achieve those ends." *Id.*

In the instant case below, the Court of Appeals of Maryland found that the statutory procedure of one-way closed-circuit television constituted the greatest degree of intrusion upon the right to face-to-face confrontation. "It is, rather the ultimate—the fartherest a court can go in that direction." *Craig* v. *State*, 316 Md. 551, 567, 560 A.2d 1120, 1128 (1989). The court also found that the "appropriate protective measures must then be tailored to limit the confrontation right as little as feasible. . . . Thus, for example, if a child witness will not suffer 'severe emotional distress' when testifying via two-way television in a room separate from the courtroom, so the accused is visible to the witness as well as visa versa, that procedure should be followed." *Id.* Only after the court determines that "*neither two-way television nor any other device* short of that authorized by § 9-102 will enable the witness to testify, [may it] then turn to that section." *Id.* at 568, 560 A.2d at 1128 (emphasis added). The court of appeals found that the trial judge "*did not explore any alternatives* to the use of one-way closed-circuit television." *Id.* (emphasis added).

C. Even If The State's Interest Outweighs The Defendant's Right To Face-To-Face Confrontation When Considered Alone, It Does Not Outweigh When Considering The Unconstitutional Impact Of The Statute Upon The Sixth Amendment Rights To Counsel And Trial By Jury.

The Maryland statute cannot be invoked if the defendant elects self-representation but can be invoked if the defendant elects the sixth amendment right to counsel. Consequently,

the statute forces the defendant to choose between the sixth amendment right to counsel and the sixth amendment right to face-to-face confrontation.

Forcing the defendant to choose among constitutional rights is impermissible. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968). If the defendant chooses to face her accuser, she must necessarily forego her right to be represented by an attorney and must represent herself. If she elects her constitutionally protected right to counsel, she can be denied face-to-face confrontation. In preserving face-to-face confrontation only if a defendant elects self-representation, the statute has an unconstitutional chilling effect upon the exercise of the right to counsel.

The statute also denies effective assistance of counsel. Except when the defendant is testifying as a witness, the defendant has a "right to *unrestricted access* to his lawyer for advice . . ." *Perry* v. *Leeke*, 109 S. Ct. 594, 602 (1989) (emphasis added); *Geders* v. *United States*, 425 U.S. 80, 89 (1976) (right to consult). The sixth amendment right to counsel is necessarily diluted by the process of a spacially bifurcated proceeding. In the instant case, the respondent's attorneys were denied the opportunity to fully communicate with their client.

The statute places the defense attorney, the prosecutor, and the child witness in one room, and the defendant, the factfinder, and the judge in another room. This arrangement produces the following phenomena: (1) constitutionally guaranteed attorney-client communication can only be accomplished over the telephone and/or through another attorney over the telephone and outside of the visual scope of the attorney; (2) the attorney with the witness is totally unaware of nonverbal communication taking place in the courtroom, including that which is being given or received by either the factfinder or the judge; and (3) the attorney with the child fact witness was precluded from offering or receiving nonverbal communication with the client.

The defense attorney with the witness and the prosecutor—during both direct examination and cross-examination—could not simultaneously (1) hear and see the fact witness, (2)

observe the respondent's reaction to the fact witness, and (3) observe the factfinder's reaction to the fact witness. Moreover, under the statute, the defense attorney cannot prevent prosecutorial overreaching, such as nonverbal prosecutorial communication with the child fact witness during the child's testimony. Because the judge is not even present and cannot observe the prosecuting attorney, the judge cannot even intelligently rule on any objections made by defense counsel. *See State* v. *Warford*, 223 Neb. 368, 389 N.W.2d 575, 581-82 (1986).

Moreover, in the instant case, the only means of communication between the respondent and her attorney worked sporadically at best. The respondent and counsel with her in the courtroom were unable to communicate with counsel present with the child fact witness during the entire competency voir dire. The respondent, by reason of her special knowledge of this child's intellectual, psychological, and moral capabilities, was in the unique position of being able to greatly assist her counsel in this voir dire. As the "problem" was not even discovered until the voir dire was completed, the respondent was unable to assist counsel or impact on the voir dire in any way. The trial judge was in chambers with the child fact witness, qualifying her as to competency, and could not observe, unlike later during the proceeding, the respondent's difficulty and inability to communicate through the "supposedly" open phone line. After the competency voir dire was completed, and the judge and counsel returned to the courtroom and the jurors brought in to view the examination of the child fact witness, via television monitors, the sheriff then brought the respondent's communication problem to the court's attention.

> THE SHERIFF: I don't believe counsel can communicate. Just haven't found him.
>
> THE COURT: Well, maybe he hasn't picked up the phone so . . . Sheriff, if you're ready to proceed you can do so. I will instruct the clerk to swear in the witness.
>
> . . .
>
> MR. KOLODNER: Counsel says he's been trying to reach me on the phone and . . . many times and has not been able to reach me. I've been in there saying, I'm here, does anyone want to say anything to me, but I haven't been able to get any response.

THE COURT: Have you pushed the button down?

MR. KOLODNER: I didn't know . . . I didn't push any button.

THE COURT: Sorry about that, but you're supposed to push the button.

MS. O'DONNELL (the prosecutor): I'm not aware. Your Honor, I would suggest that perhaps we excuse the jury and work out the wrinkles and. . .

MR. KOLODNER: That's ironic. I didn't know there was a button. Maybe I did something wrong because the button. . .

. . .

THE COURT: Sheriff, would you just come here a minute, please? I'm not trying to take you to task or anything. Is it going to take a little while—are you having a problem with that?

THE SHERIFF: Yes sir.

THE COURT: Okay, probably on this note we might break for lunch, okay? Do you want to do that. And apparently counsel's having problems communicating with his colleague at the trial table on the . . . my telephone.

THE SHERIFF: Do you have any problems with me putting another telephone in there?

THE COURT: I . . . you can put anything in there.

MR. KOLODNER: Well, was I supposed to push anything?

THE COURT: Was he to push the button down or something?

THE SHERIFF: No, you should just talk.

MR. KOLODNER: I way saying. . .

THE SHERIFF: Did you hang it up?

MR. KOLODNER: Have it hung up, no. Well, you were in there when I kept saying, I'm on here, is anyone talking.

. . .

THE SHERIFF: Sorry, about this, Your Honor. Yesterday it worked fine, no problems at all.

After working on the "phone problem," the court allowed the direct and cross-examination of the child fact witness to proceed (J.A. 89-139). The respondent was again unable to reach

counsel in chambers and unable to communicate with him in any way during the entire direct and cross-examination. Despite her unique ability to assist her counsel, she was unable to do so because she could not communicate with him.

Moreover, by having the judge make the factual determination of whether the child will experience trauma when testifying, the statute denies the right to trial by jury by making the judge the finder of the ultimate fact of the truthfulness of a witness.

The State posits "the need to protect particularly vulnerable child victims from the trauma of testifying in the physical presence of the accused" as one of the two compelling state interests justifying the use of child protective measures such as one-way closed-circuit television. Petitioner's Brief at 14. The premise to this argument must necessarily be that the child is a truthful witness, and that the child's trauma will impair truthful testimony.

The crucible of confrontation is the test of truth in the courtroom. The rigor of face-to-face confrontation impresses the witness with "the seriousness and solemnity of the occasion," *Wildermuth* v. *State*, 310 Md. 496, 513, 530 A.2d 275, 283 (1987), and "aids the fact-finder in distinguishing the false accuser from the true, the uncertain from the sure." *State* v. *Vincent*, 159 Ariz. 418, 768 P.2d 150, 162 (1989). Both the majority and concurring opinions in *Coy* recognize that trauma may confound and undo the false accuser, as well as impair the search for truth. *Coy*, 108 S. Ct. at 2802, 2804.

For centuries, the factfinder, observing the demeanor of the fact witness and relying upon common experience, decided whether the witness was telling the truth or a lie. "This open examination of witnesses *viva voce*, is the preference of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination. . . . In short by this method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behavior, and inclinations of the witness." 3 W. Blackstone, *Commentaries* *373.

The State naturally endorses this Court's observation that face-to-face testimony may upset the truthful abused child.

The State admits that the trauma may come from the courtroom generally or from having to face and adult authority figure who has been both physically and psychologically abusive. Petitioner's Brief at 23.

The State, however, is silent with respect to the other source of trauma identified by this Court in *Coy:* trauma that "may confound and undo the false accuser, or reveals the child coached by a malevolent adult." *Coy,* 108 S. Ct. at 2802. Certainly, if this Court wishes to balance the competing interests of the accused and the accuser with respect to testimonial trauma, it wants to accomplish the following: all trauma that upsets the truthful abused child should be checked; all trauma that confounds and undoes the false accuser or reveals the child coached by a malevolent adult should be exploitable by counsel within the rules of evidence and procedure.

Nevertheless, the Maryland statute—and the state in its brief—provide that all a judge need do is determine "that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). No inquiry need be made, much less by a particular standard of persuasion, as to the truth or falsity of proferred child testimony. Thus, whether the testimony will result in the child suffering serious emotional distress because the child is telling a painful truth, or whether the testimony will result in the child suffering serious emotional distress because the child is a false accuser coached by a malevolent adult, the State is equally entitled to the use of the special procedure, in lieu of face-to-face confrontation, in the prosecution of its case.[7]

The net effect to the defendant is that the accuser is presumed to be suffering from that type of trauma associated with telling a painful truth, without any evidence in support of that

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[7] If the parents of a child victim file a civil suit, the child would be subject to civil deposition in the presence of the civil defendant. Thus, while the statute permits taking the defendant's liberty without face-to-face confrontation, the law does not permit taking the civil defendant's money without face-to-face confrontation.

premise. If the trial court finds that face-to-face testimony will result in the child suffering serious emotional distress, the court may permit the child to testify outside of the presence of the judge, the factfinder, and the defendant. In so deciding, the judge determines a fact heretofore left to the factfinder—the credibility of the witness. The judge necessarily decides that the trauma is upsetting the "truthful" abused child. Through the use of this statute, the State intrudes upon the defendant's right to trial by jury because the State has legislated the credibility of the child fact witness in contravention of the defendant's sixth amendment right to trial by jury.

III. EVEN IF THE MARYLAND STATUTE IS CONSTITUTIONAL, IT IS UNCONSTITUTIONAL AS APPLIED, BECAUSE THE TRIAL JUDGE FAILED TO MAKE AN INDIVIDUALIZED FINDING, BASED UPON PERSONALLY QUESTIONING AND OBSERVING THE CHILD FACT WITNESSES IN THE DEFENDANT'S PRESENCE, THAT EACH OF THEM WOULD SUFFER SERIOUS EMOTIONAL DISTRESS, CAUSALLY CONNECTED TO TESTIFYING IN THE PRESENCE OF THE DEFENDANT.

As this Court recognized in *Coy,* if there are exceptions to the "most literal application" of the confrontation clause, "something more than [a] generalized finding . . . is needed when the exception is not 'firmly . . . rooted in our jurisprudence.'" *Coy,* 108 S. Ct. at 2803 (Scalia, J.). If there are to be exceptions, they must "further an important public policy . . . . The primary focus . . . will be on the necessity prong. [M]ore than [a] generalized legislative finding of necessity . . . is required. [The court must make] a case-specific finding of necessity, . . ." *Id.* at 2805 (O'Connor, J., concurring).

This is consonant with a number of state courts that have interpreted child shield statutes. *See State* v. *Wilhite,* 160 Ariz. 228, 772 P.2d 582 (1989) (videotape testimony unconstitutional under the sixth amendment and state constitution when the State failed to show that the child witness needed special protection from a face-to-face courtroom encounter with the defendant); *State* v. *Davidson,* 764 S.W.2d 731 (Mo. 1989)

(deposition improperly admitted when the State failed to introduce evidence as to trauma the child would suffer by testifying in the presence of the defendant); *State* v. *McCutcheon*, 234 N.J. Super. 434, 560 A.2d 1303 (1988) (only children found by the court to "suffer severe emotional or mental distress" by being forced to testify in court, face-to-face with the alleged abuser, could testify via closed-circuit television); *State* v. *Eastham*, 39 Ohio St. 3d 307, 530 N.E.2d 409 (1988) (out-of-court testimony of a child broadcast to defendant in the courtroom by concealed video camera violated sixth amendment and state constitution because there was no particularized finding of necessity); *Commonwealth* v. *Ludwig*, 366 Pa. Super. 361, 531 A.2d 459 (1987), *appeal granted*, 518 Pa. 617, 541 A.2d 744 (1988) (closed-circuit television approved after psychologist testified that victim would be traumatized again if required to testify in court in the physical presence of her father); *State* v. *Taylor*, 562 A.2d 445, 453 (R.I. 1989) (state constitution requires an attempt to have the child testify in the defendant's presence).

This is consistent with the protections that some states have provided. *See, e.g.*, Mass. Gen. L. ch. 278, § 16D(b)(3) (1986) ("The defendant shall also have the right to be present unless the court's order under paragraph (1) is based wholly or in part upon a finding that the child witness is likely to suffer trauma as a result of testifying in the presence of the defendant"); Minn. Stat. § 595.02 (1988) ("If the court, upon its own motion or the motion of any party, determines that the presence of the defendant during testimony taken pursuant to this subdivision would psychologically traumatize the witness . . ."); N.J. Stat. Ann. § 2A:84A-32.4(b) (West Supp. 1989) (order for closed-circuit televised testimony must be "specific as to whether the witness will testify outside the presence of spectators, the defendant, the jury, or all of them and shall be based on specific findings relating to the impact in the presence of each").

In Maryland, by statute, before the use of extraordinary procedures is permitted, the trial judge must first determine that "testimony by the child victim *in the courtroom* will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc.

Code Ann. § 9-102(a)(1)(ii) (1989) (emphasis added). In the instant case, the trial judge did not have the judicial gloss of the Court of Appeals of Maryland, later provided in *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987). Nor did the judge have this Court's gloss of the Iowa statute in *Coy*. Consequently, the trial judge in the instant case literally applied the language of the statute.

The trial judge (1) had the benefit only of expert testimony on the ability of the children to communicate, (2) did not question any of the children himself, (3) did not observe any child's behavior on the witness stand before making his ruling, (4) did not question the experts himself to focus the direct examination of the prosecutor, and (5) did not distinguish between "in the courtroom" and "in the defendant's presence." The trial judge ruled that "'the testimony of each of these children *in a courtroom* will [result] in each child suffering serious emotional distress . . . such that each of these children cannot reasonably communicate." *Craig* v. *State*, 316 Md. 551, 570, 560 A.2d 1120, 1129 (1989) (emphasis added by the Court of Appeals of Maryland).[8] Only after the imposition of the extraordinary statutory procedure in the instant case did the Court of Appeals of Maryland have occasion to interpret section 9-102. In *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), the court upheld the facial constitutionality of the statute. Reasoning that the right to face-to-face confrontation is not absolute, the court fashioned a two-part "appropriate cir-

[8] Imagine the possibility that the child fact witness, found unable to communicate in the presence of the defendant, based solely upon the testimony of an expert, later files civil suit against the criminal defendant. If during the initial discovery process, the child witness is able to give deposition testimony in the presence of the prior criminal (now civil) defendant, the accused's attorney would likely file post-conviction relief on the basis of newly discovered evidence. It might reasonably be argued that the courtroom—not the defendant—is what caused the serious emotional distress of the child witness. If this fact is established, the court may grant a new trial, finding that the accused at the prior criminal trial was denied the right to confrontation.

cumstances test." The first part of the test is the existence of a compelling state interest. The second part of the test is a particularized determination of the functional unavailability of the child witness as a result of the inability to testify, in turn caused by serious emotional distress. In applying the test, the court found that "[w]hile personal observation by the judge may not be a *sine qua non* under [section] 9-102, it should be the rule rather than the exception." *Id.* at 524, 530 A.2d at 289.

The Court of Appeals of Maryland next had occasion to consider the statute in the instant case. In *Craig* v. *State*, 316 Md. 551, 560 A.2d 1120 (1989), the court of appeals utilized principles of statutory construction, applied in light of the arguments of counsel in *Craig*, its earlier decision in *Wildermuth*, and this Court's opinion in *Coy*. The court found that the inquiry of the trial judge in determining the threshold issue of whether a child fact witness would suffer severe emotional distress, if required to testify "in the courtroom," should have been asked in the much narrower context of the ability of the witness to testify in the courtroom in the presence of the accused. The court determined that the trial judge should not make a general inquiry regarding the child's inability to testify in open court, because such a finding is too broad to satisfy the necessity requirement of these extraordinary proceedings. *See State* v. *Crandall*, 231 N.J. Super. 124, 131-32, 555 A.2d 35, 39, *cert. granted*, 117 N.J. 143, 564 A.2d 866 (1989) (finding that the child witness would suffer "substantial emotional upset" if required "to testify in court" was insufficient to support the use of close-circuit television to receive the child's testimony).

The analysis of the Court of Appeals of Maryland is sound. A finding of severe emotional distress, and a finding that such stress is causally related to testifying in the live, face-to-face presence of the defendant, is absolutely critical to support an exception to the otherwise absolute requirement of face-to-face confrontation. The court stated: "[T]he determinative inquiry required to preclude face-to-face confrontation is the effect of the presence of the defendant on the witness or the witness's testimony . . ." *Craig*, 316 Md. at 565, 560 A.2d at 1127 (citing with approval *State* v. *Vincent*, 159 Ariz. 418, 432, 768 P.2d 150, 164 (1989); *State* v. *Jarzbek*, 210 Conn. 396, 397, 554 A.2d 1094,

1095 (1989); *State* v. *Bonello*, 210 Conn. 51, 58-59, 554 A.2d 277, 281, *cert. denied*, 109 S. Ct. 2103, *reh. denied*, 109 S. Ct. 3268 (1989). The Court of Appeals of Maryland concluded that the operative statutory language of "serious emotional distress," which renders a child victim unable to "reasonably communicate," must be determined to arise primarily from face-to-face confrontation with the defendant. *Craig*, 316 Md. at 566, 560 A.2d at 1127.

If it is constitutional at all, the Maryland statute ordinarily cannot be invoked unless the child witness is initially questioned, either inside or outside the courtroom, in the defendant's presence, and is found by the judge to be unable to "reasonably communicate" because of "serious emotional distress" causally connected to the presence of the defendant. *Id.* at 566-67, 560 A.2d at 1127 (citing *Wildermuth* v. *State*, 310 Md. 496, 523-24, 530 A.2d 275, 289 (1987)) (personal observation by judge should be the rule rather than the exception).

Testimony of experts, given pre-*Wildermuth* and pre-*Coy*, in the context of the limited question of whether the child would be unable to testify "in a courtroom," cannot support an exception to the right to face-to-face confrontation. The Court of Appeals of Maryland recognized that some of the expert testimony did suggest that each child would have some, or even considerable, difficulty in testifying in the defendant's presence. However, upon careful review of the expert testimony, in the context of the statute, the court of appeals concluded that the testimony of the experts was not sharply focused on the effect of the defendant's presence on the child witness, and that —in any event—the trial court relied entirely upon the testimony of experts regarding what the likely future event of the child's testimony would be. *Id.* at 570, 560 A.2d at 1129.

Applying the statute literally, the trial judge did no more than find, on the evidence before him, that serious emotional distress, resulting in an inability to communicate, would be the product of testimony in a courtroom. The Court of Appeals of Maryland, after carefully considering the expert testimony, held that the trial judge could not have found that the severe emotional distress, supposedly resulting in an inability to communicate, was in any way related to testifying in the presence

of the defendant. *Id.* The trial judge failed to make an individualized finding that the child fact witnesses needed special protection from testifying in the presence of the defendant. The Maryland statute is unconstitutional as applied to the respondent.

IV. EVEN IF THE MARYLAND STATUTE IS CONSTITUTIONAL, THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND SHOULD NEVERTHELESS BE AFFIRMED BECAUSE ITS JUDGMENT WAS BASED SOLELY UPON INDEPENDENT AND ADEQUATE STATE GROUNDS.

This Court has recognized that the issue of "adequate and independent state grounds is based, in part, on the 'limitations of our own jurisdiction.'" *Michigan* v. *Long*, 463 U.S. 1032, 1042 (1983). In *Long*, the Court set forth a standard that it has applied ever since, when it stated:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court reached. . . . If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

Id. at 1040-41.

Any litigation under section 9-102 would necessarily include, by any competent attorney, a challenge under the sixth amendment right to confrontation. The first case to present such a challenge was *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987), in which the Court of Appeals of Maryland, Maryland's court of last resort, upheld the constitutionality of section

9-102. However, as to one of the two appellants, the court reversed the conviction because the trial judge failed to satisfy the state statutory requirements. The court stated:

> Each appellant now launches a multifaceted attack on his convictions. The central thrust in each case is the contention that § 9-102 is unconstitutional because it violated the confrontation clause of the sixth amendment to the United States Constitution (applicable to the states through the fourteenth amendment) as well as art. 21 of the Maryland Declaration of Rights. We reject those contentions. We also reject appellants' other constitutional assaults on § 9-102, and affirm McKoy's convictions. We reverse Wildermuth's convictions and remand his case for a new trial, however, because we agree that in his case the threshold showing essential to the invocation of § 9-102 has not been made.

310 Md. at 501, 530 A.2d at 277.

The court began by analyzing and upholding the statute in terms of the constitutional guarantees under the sixth amendment right to confrontation. *Id.* at 504-20, 530 A.2d at 279-87 (section A. of the opinion was entitled "Scope of the Right to Confrontation"; section B. was entitled "Application of Section 9-102 Does Not Result in the Unconstitutional Denial of Defendants' Right to Confrontation").

The court then turned "to the question of whether the evidence before Judge Williams in Wildermuth's case was sufficient to support his section [9-102](a)(1)(ii) finding." *Id.* at 520, 530 A.2d at 287 (section C. was entitled "The Finding of 'Unavailability' in Wildermuth's Case"). The court's six page analysis of the statute and its application in the instant case resulted in the following holding:

> While the testimony need not be given in the precise words of the statute, it must be clear that the statutory requirements are met in substance. Testimony about the likely impact on the child testifying must be definite, related to the statutory standard, and specific to the potential child witness him or herself. . . .
>
> The evidence in Wildermuth's case was not enough.[9]

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[9] The conviction of McCoy, the other appellant, was affirmed because he conceded at trial that his challenge was purely constitutional and not based on the failure to satisfy the statutory prerequisites. *Id.* at 520, 530 A.2d at 287.

Id. at 524-25, 531 A.2d at 289.

Section 9-102(a)(1)(ii) requires that the "judge determine[] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." Md. Cts. & Jud. Proc. Code Ann. § 9-102(a)(1)(ii) (1989). The court found insufficient evidence to support the statutory requirement. *Id.* at 523, 530 A.2d at 288. Moreover, the trial judge "never questioned or even observed the child witness before he made his ruling. While personal observation by the judge may not be a *sine quo non* under § 9-102, it should be the rule rather than the exception." *Id.* at 523-24, 530 A.2d at 289. The court held that the failure to comply with the state statute required a reversal of Wildermuth's conviction.

Subsequent to *Wildermuth*, this Court decided *Coy* v. *Iowa*, 487 U.S. 1012 (1988), which provided additional judicial gloss on the sixth amendment right to confrontation. The instant case was briefed and argued in the intermediate appellate court prior to the Court's decision in *Coy*. The Court of Appeals of Maryland "granted a writ of certiorari chiefly in order to reexamine *Wildermuth* in the light of the Supreme Court's pronouncements in *Coy*." *Craig* v. *State*, 316 Md. 551, 556, 560 A.2d 1120, 1122 (1989). Judge Atkins, who wrote for a unanimous court in *Wildermuth*, wrote again for a unanimous court in *Craig*.

Like in *Wildermuth*, the *Craig* court necessarily addressed the sixth amendment. *Id.* at 556-62, 560 A.2d at 1122-25 (part II of the opinion). A fair reading of *Craig* can in no way give rise to the argument that the court's decision either rested primarily on federal law or is inextricably woven with federal law. To the contrary, as its holding makes clear, the Court of Appeals of Maryland meticulously analyzed *Coy*, only to refute the respondent's contention that section 9-102 was unconstitutional, either on its face or as applied.

In light of *Coy's* holding that the sixth amendment requires, at least under the facts of *Coy*, face-to-face confrontation, the Court of Appeals of Maryland provided some additional judicial gloss on section 9-102—gloss that would not have been needed to resolve *Wildermuth* and gloss that was in no way dispositive

of *Craig*. Section 9-102(a)(1)(ii) requires that the "judge determine[] that testimony by the child victim in the courtroom will result in the child suffering serious emotional distress such that the child cannot reasonably communicate." In light of *Coy*, the court of appeals interpreted "in the courtroom" to mean "in the courtroom in the presence of the defendant." *Id.* at 566, 560 A.2d at 1127.[10] The court then discussed the difference between making a determination as to serious emotional distress (1) from testifying in the courtroom and (2) from testifying in the presence of the defendant.

However, despite the relevance—and under the respondent's position, the correctness—of this distinction, the Court of Appeals of Maryland had no need to—and did not—employ this distinction to resolve the case. Instead, the court resolved the case based on the trial judge's failure to comply with the requirements of section 9-102(a)(1)(ii), as it had previously interpreted that section in *Wildermuth*.

> Whether the trial judge might have narrowed the generality of this testimony, had he questioned the potential witnesses, we cannot tell. *He did not question them; he did not have before him our declaration that "personal observation [and inquiry] by the judge . . . should be the rule rather than the exception."* *Wildermuth*, 310 Md. at 523-24, 530 A.2d at 289.

Craig, 316 Md. at 570, 560 A.2d at 1129 (emphasis added) (brackets in *Craig*).

The resolution of *Wildermuth*, based on the interpretation of the state statute, followed by the resolution of *Craig*, based on

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[10] Of course, the statute implicitly already required "in the presence of the defendant" because, as the court noted, "[w]hen we read § 9-102(a)(1)(ii), we approach construction of the phrase 'in the courtroom' with the understanding that the 'meaning of the plainest language' is controlled by the context in which it appears." *Id.* at 566, 560 A.2d at 1127. Applying a state law principle of statutory construction, the court stated that "as a general rule a statute will be construed to avoid constitutional conflict whenever feasible. We also presume that the General Assembly intended its enactments to be in harmony rather than at odds with [the] United States Constitution." *Craig*, 316 Md. at 566, 560 A.2d at 1127 (citations omitted).

the *Wildermuth* gloss of the statute, presents this Court with the situation of an improvidently granted writ of certiorari in *Craig*. An examination of *Aimone* v. *Finley*, 465 U.S. 1095 (1984), and *California* v. *Freeman*, 109 S. Ct. 854 (1989), both of which this Court dismissed for want of jurisdiction, and *New York* v. *Class*, 475 U.S. 106 (1986), in which the court properly asserted jurisdiction, make clear that the writ of certiorari was improvidently granted in the instant case and that this Court lacks jurisdiction.

In *Aimone* v. *Finley*, the Court dismissed for want of jurisdiction. Prior to *Aimone*, in *In re Roger B.*, 84 Ill. 2d 323, 418 N.E.2d 751 (1981), the Supreme Court of Illinois upheld the state adoption act as constitutional, against a challenge that it was violative of the equal protection clause of the United States Constitution. In *Aimone* v. *Finley*, 113 Ill. App. 3d 507, 447 N.E.2d 868 (1983), the plaintiff mounted a due process challenge, which the court rejected. The court stated:

> [W]e find the opinion in *In Re Roger B.* actually transcends the issue of constitutionality and considers the broad background of the policy considerations in protecting the privacy of both the adopting parents and also of the natural parents.
>
> . . .
>
> Therefore, we conclude the issues raised by plaintiff are settled by the [state] supreme court in *In Re Roger B.* The [state] supreme court expressly held "the trial court did not abuse its discretion in concluding that [plaintiff's] desire to obtain release of the records should not prevail over the potential infringement of the rights of other parties." 84 Ill.2d 323, 336-37, 49 Ill.Dec 731, 418 N.E.2d 751.

Id. at 511, 447 N.E.2d at 870. This Court "dismissed for want of jurisdiction, it appearing the judgment below rested upon independent and adequate state grounds." *Aimone* v. *Finley*, 465 U.S. 1095 (1984).

On the other hand, in *New York* v. *Class*, 475 U.S. 106 (1986), this Court rejected a claim of independent and adequate state grounds, stating:

> Respondent's claim that the opinion below rested on independent and adequate state *statutory* grounds is . . . without merit. The New York Court of Appeals did not hold that [the statute] prohibited the search at issue here, but, in rejecting an assertion of petitioner, merely held that [the statute] "provided no *justification*" for a search . . . . In determining that the police officer's action was prohibited, the court below looked to the Federal Constitution, not the State's statute. Moreover, New York adheres to the general rule that, when statutory construction can resolve a case, courts should not decide issues. . . . Since the New York Court of Appeals discussed both statutory and constitutional grounds, we may infer that the court believed the statutory issue insufficient to resolve the case. The discussion of the statute therefore could not have constituted an independent and adequate state ground.

Id. at 110 (emphasis in original).

Maryland, like New York, resolves its statutes, whenever possible, on statutory construction grounds, avoiding even reaching constitutional issues. In *Davis* v. *State*, 312 Md. 172, 539 A.2d 218 (1988), the Court of Appeals of Maryland stated: "As a matter of statutory construction, this Court has consistently adhered to the principle that we will, whenever reasonably possible, construe and apply a statute to avoid casting serious doubt upon its constitutionality." *Id.* at 179-80, 539 A.2d at 220. The Court of Appeals of Maryland also applied this principle of state statutory construction in the instant case below. *Craig*, 316 Md. at 566, 560 A.2d at 1127 ("construed to avoid constitutional conflict whenever feasible").

In *Class*, this Court determined that the New York Court of Appeals did not find that the state statute imposed a limitation on the police greater than that imposed by the federal constitution. The Court implied that, in light of New York's statutory construction rules, had the state court been able to find a way to interpret the state statute to control, it would have. However, the New York court did not so find, and thus it resolved the case on federal constitutional grounds.

The Maryland situation in the instant case presents precisely the opposite scenario from *Class*. In *Wildermuth*, the Court of Appeals of Maryland found no constitutional violation but did find a state statutory violation and resolved the case on that basis. 310 Md. at 524-25, 530 A.2d at 289. In *Craig*, the Court of Appeals of Maryland recognized that a constitutional issue was

possible in light of *Coy*. However, in light of a clear statutory violation of nonconstitutional dimension, combined with the court's approach of avoidance, whenever possible, of constitutional claims, the court resolved the case with a plain statement as to the adequate and independent state grounds on which is was relying.

This Court's most recent application of the *Michigan* v. *Long* doctrine was last term in *California* v. *Freeman*, 109 S. Ct. 854 (1989). In *Freeman*, the defendant, a producer and director of pornographic films, was convicted of pandering. The California Supreme Court reversed, holding that because the payments were acting fees, there was no evidence that the acts were performed for sexual arousal or gratification. *People* v. *Freeman*, 46 Cal. 3d 419, 424-25, 250 Cal. Rptr. 598, 600, 758 P.2d 1128, 1131 (1988). The Court also observed that, even if the conduct came within the scope of the statute, such an application "would impunge unconstitutionality upon First Amendment values." *Id.*

The State petitioned for a writ of certiorari to review the first amendment holding. Justice O'Connor denied the application for stay based on this Court's lack of jurisdiction. Her holding was based on the fact that the California Supreme Court resolved the case on its interpretation of a state statute, noting that "[i]nterpretations of state law by a State's highest court are, of course, binding on this Court." 109 S. Ct. at 856. Justice O'Connor further stated:

> The discussion section of the California Supreme Court opinion is divided into two subsections, the first titled "The Statutory Language," the second titled, "First Amendment Considerations." The state court's discussion of the language of the Penal Code . . . concludes with the clear holding [based on the statutory language]. Discussion of . . . the First Amendment . . . constitutes an independent alternative holding. Were we to review the state court's decision and hold that it had misinterpreted the strictures of the First Amendment, on remand the court would still reverse Freeman's conviction on state statutory law grounds. This is precisely the result of the doctrine of adequate and independent state grounds seeks to avoid.

109 S. Ct. at 856.

In *Craig*, the Court of Appeals of Maryland resolved the case on a statutory construction analysis, as those principles were applied earlier in *Wildermuth* v. *State*, 310 Md. 496, 530 A.2d 275 (1987). Thus, this Court should dismiss the writ of certiorari as improvidently granted. Moreover, even if this Court were to find Judge Atkins' discussion concerning the constitutional issues surrounding the statute, as applied in light of *Coy*, to be a holding in *Craig*, the result should be the same. As in *Freeman*, there is a plain statement as to a statutory resolution of the case, which "constitutes an independent alternative holding." 109 S. Ct. at 856. Thus, regardless of the relationship between the sixth amendment and section 9-102, as applied in the instant case, the provisions of the statute, be they of constitutional dimension or not, were not satisfied, and the respondent's convictions cannot stand.

CONCLUSION

It is respectfully submitted that this Court should affirm the judgment of the Court of Appeals of Maryland. This disposition is fully supported by each of the respondent's four arguments. If the Court is persuaded that the integrity of the factfinding process requires an absolute sixth amendment right to face-to-face confrontation, under those circumstances argued by the respondent, the Court should declare the Maryland statute unconstitutional and affirm the judgment of the Court of Appeals of Maryland. If the Court is at least persuaded that the sixth amendment right to face-to-face confrontation outweighs any countervailing interests, the Court should declare the Maryland statute unconstitutional and affirm the judgment of the Court of Appeals of Maryland. If the Court is at least persuaded that the trial court failed to make an individualized finding to support the denial of the sixth amendment right to face-to-face confrontation, the Court should declare the Maryland statute unconstitutional, as applied in this case, and affirm the judgment of the Court of Appeals of Maryland. If the Court is persuaded that the Court of Appeals of Maryland resolved this case based on independent and adequate state grounds, the Court should dismiss the writ of certiorari as improvi-

dently granted and affirm the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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